No. 89-515

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ROCHESTER, NEW HAMPSHIRE, SCHOOL DISTRICT,
Petitioner,

v.

TIMOTHY W., BY AND THROUGH HIS MOTHER AND NEXT FRIEND, CYNTHIA W.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

---

REPLY BRIEF FOR PETITIONER

JOEL I. KLEIN *
H. BARTOW FARR, III
CHRISTOPHER D. CERF
ONEK, KLEIN & FARR
2550 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184

GERALD M. ZELIN
SOULE, LESLIE, ZELIN, SAYWARD & LOUGHMAN
220 Main Street
Salem, New Hampshire 03079
(603) 898-9776

* *Counsel of Record*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-515

ROCHESTER, NEW HAMPSHIRE, SCHOOL DISTRICT,
Petitioner,

v.

TIMOTHY W., BY AND THROUGH HIS MOTHER AND NEXT FRIEND, CYNTHIA W.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

---

REPLY BRIEF FOR PETITIONER

Respondent, much like the court of appeals before him, responds to petitioner's position by linking two arguments: *first*, that he would, in fact, benefit from education; and *second*, that Congress therefore would not have been unreasonable in incorporating the view that *all* children could benefit from education into the Education for All Handicapped Children Act ("EAHCA"). When these arguments are uncoupled, however, as they must be, it becomes apparent that respondent's view of the statute cannot stand. This case involves a child who was found—based on actual attempts at education as well as a lengthy medical history—to be incapable of benefiting from educational services. Congress did not intend that costly educa-

tional programs be provided to such children during the eighteen years of schooling covered by the EAHCA.

1. Respondent starts with a lengthy, one-sided review of the evidence in an attempt to support his claim that "he has educational needs, and that he can benefit from education." Brief in Opposition ("Opp.") at 2. But the district court squarely found otherwise, concluding that "Timothy W. is not capable of benefitting from special education." Pet. App. 57a. This finding was based on a comprehensive factual record and did not, as respondent suggests, rest on a matter of "one's personal philosophy of education." Opp. at 5 n.2. On the contrary, in addition to the exhaustive information about respondent's medical history, the district court had before it, and relied on, extensive evidence concerning the fifteen months immediately prior to trial in which petitioner had made elaborate efforts to train and educate respondent, without having achieved any success whatsoever. *See* Pet. at 5-6. These are not pleasant facts to contemplate or findings to make, as the district court candidly acknowledged. *See* Pet. App. 57a. But they are nevertheless the findings in this case and, not having been disturbed on appeal, they form the factual predicate for this Court's consideration of the legal issues presented by the petition. *See, e.g., Goodman v. Lukens Steel Co.*, 107 S. Ct. 2617, 2623 (1987).

2. Starting from a proper factual predicate, therefore, the issue in this case is not, as respondent would have it, whether Congress intended to exclude from coverage under the EAHCA "a child considered by the *education agency* to be too severely handicapped to benefit from educational services." (Opp. at Questions Presented) (emphasis added). Rather, the question is what the EAHCA requires when, *based on actual attempts at educating a particular child, a court properly finds that the child cannot benefit from such education.*[1] As to that question, re-

[1] Indeed, acknowledging a strong preference for inclusion of children under the coverage of the EAHCA, petitioner argued below

spondent has little to say other than to reiterate the EAHCA's persistent use of the language "*all* handicapped children." Opp. at 12-13. As we explained in our petition, however, simply as a matter of interpreting the "plain language" of a statute on which respondent claims to place primary emphasis, the significance of the word "all" in the EAHCA depends, in turn, on the interpretation of the definition of the word "handicapped"—a definition that expressly limits statutory coverage to children who "*require* special education and related services." 20 U.S.C. § 1401(a)(1) (emphasis added). *See also* 20 U.S.C. §§ 1412(2)(C), 1414(a)(1)(A) (states must include only children who "are in *need* of special education") (emphasis added).[2] Moreover, respondent says absolutely nothing about the other statutory limitation that we argue is included in the EAHCA: *i.e.*, that it provides "a free *appropriate* public education." 20 U.S.C. § 1400(c) (emphasis added). That statutory language likewise makes clear that children who are shown to be incapable of benefiting from education are not covered since, as to them, there is *no* education that is "appropriate." *Cf. Board of Educ. v. Rowley*, 458 U.S. 176, 200-01 (1982).

In addition to placing heavy reliance on the use of the word "all," respondent quotes extensively from the legislative history of the EAHCA, including testimony by interested witnesses stating that every child is educable. Opp. at 14-15. As an initial matter, such legislative history provides an insufficient basis to engraft a mandatory fed-

---

that the burden should be placed on the school district to show that a particular individual was incapable of benefiting from educational services. Pet. App. 51a.

[2] Respondent asserts that this limitation in the statute should be read as "impos[ing] an upper limit on who is eligible for *special* education." Opp. at 13 n.8 (emphasis in original). But there is certainly nothing in the "plain language" of the statute—so heavily relied on by respondent and the court below when it came to the word "all"—to suggest such a limitation on the words "require" and "need."

eral funding requirement on participating States, a dispositive legal objection that respondent does not even address. *See* Pet. at 14-15; Br. *Amici Curiae* of The National League of Cities, *et al.* In any event, while the statements that are cited may reflect the general beliefs of various witnesses and even individual legislators, they simply do not answer the question whether Congress intended to insist that States provide educational services to children who are shown, based on experience, to be incapable of benefiting from such services. It seems highly unlikely that Congress would have imposed such a requirement, and respondent and the court of appeals have pointed to no legislative history that convincingly demonstrates otherwise. Indeed, as we noted in our petition, the interpretation of the EAHCA advanced by respondent and the court below would mandate educational services even for a child in a coma—a position that both respondent and the court expressly disavow, but without providing any basis ih the statutory language or legislative history for so doing. *See* Opp. at 11 n.5; Pet. App. 32a.

These difficult issues cannot be avoided by the States and school districts throughout the country which, like petitioner, are being required to provide costly educational services even when they are shown to have no effect. Given the fact that such requirements divert resources from students who do benefit from educational services, it is difficult to accept the proposition that Congress, by the very general language relied on by respondent, meant to impose such a futile obligation. As this Court explained in a related context under the EAHCA, "[i]t would do little good for Congress to spend millions of dollars in providing access to a public education only to have the handicapped child receive no benefit from that education." *Board of Educ. v. Rowley*, 458 U.S. at 200-01.[3]

---

[3] Respondent seeks to avoid the force of this conclusion by asserting that "it is not an exercise in futility for Congress to determine that school districts are obligated to *attempt*, at least, to benefit all

3. Respondent further argues that this case does not merit review because the "decision below affects only a few states and school districts." Opp. at 28. The argument is belied by the filing of two *amicus curiae* briefs on behalf of seven national governmental organizations in support of the petition. The first brief, by the National League of Cities, *et al.*, underscores both the practical and the doctrinal significance of the case to several major associations of state, county and municipal governments, which assert that it is "of exceptional importance" because, *inter alia*, "[t]he First Circuit's decision threatens to throw askew the delicate balance of federal-state relations in an area of historical local concern." Motion for Leave to File Brief at 4 (pages unnumbered). The second *amici* brief, by the National School Boards Association and the American Association of School Administrators, emphasizes the importance of this case to local school districts in particular, by concluding that "the errors of the court of appeals and the financial implications of the precedent on school districts across the country . . . warrant this Court's intervention." Br. at 36.[4]

---

its handicapped students." Opp. at 17 (emphasis in original). Whatever merit that argument might have in another case, it is inapplicable here because petitioner made such an attempt without being able to achieve any success. Respondent does not suggest, nor could he, that the educational programs afforded him were inappropriate or incomplete.

[4] The National School Boards Association and the American Association of School Administrators emphasize, in their amici brief at page 19, that the Court of Appeals decision raises an important national issue by blurring the distinction between special education and related services under 20 U.S.C. § 1401(a)(16) and (17). The Respondent replies that, although physical therapy and occupational therapy are ordinarily considered related services, federal law allows a state to treat related services as special education if they contain an instructional element. Opp. at 25. However, the Respondent neglects to mention that under New Hampshire law physical therapy and occupational therapy are related services, not special education. N.H. Code Admin. R., Ed. 1101.10.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JOEL I. KLEIN *
H. BARTOW FARR, III
CHRISTOPHER D. CERF
ONEK, KLEIN & FARR
2550 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184

GERALD M. ZELIN
SOULE, LESLIE, ZELIN,
SAYWARD & LOUGHMAN
220 Main Street
Salem, New Hampshire 03079
(603) 898-9776

* *Counsel of Record*